

**DALAM MAHKAMAH TINGGI DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN MALAYSIA
GUAMAN SIVIL NO.: WA-22NCVC-280-05/2018**

ANTARA

- 1. PRA TECHNICAL SERVICES SDN BHD
(NO. SYARIKAT: 119293-P)**
- 2. PAKATAN REKA ARKITEK SDN BHD
(NO. SYARIKAT: 497728-M)**
- 3. DTLT SDN BHD
(NO. SYARIKAT:835454-U)**
- 4. TEH TEIK LIM & BROTHERS SDN BHD
(NO. SYARIKAT: 411148-T)**
- 5. DAVID TEH TEIK LIM @ TAI WAI
(NO. KAD PENGENALAN: 490811-71-5275) ...PLAINTIF-
PLAINTIF**

DAN

- 1. HONG LEONG BANK BERHAD
(NO. SYARIKAT: 97141-X)**
- 2. STANDARD CHARTERED BANK MALAYSIA BERHAD
(NO. SYARIKAT: 115793)**
- 3. HSBC BANK MALAYSIA BERHAD
(NO. SYARIKAT: 127776-V)**
- 4. CIMB ISLAMIC BANK BERHAD
(NO. SYARIKAT: 671380-H) ...DEFENDAN-DEFENDAN**

JUDGMENT

[1] Pursuant to its Notice of Application dated 26th July 2018 (Enclosure 17) the 4th Defendant applied to strike out the Plaintiffs' pleadings and,

accordingly, the Plaintiffs' claim in relation to 27 cheques honoured by the 4th Defendant.

Plaintiffs' pleaded case

[2] In this action the Plaintiffs' claim is against four banks. The Amended Writ of Summons was issued on 16th May 2018. The Plaintiffs in this action were customers of the Defendants. The Plaintiffs claim that they shared the services of an accounts executive by the name of Nor Izzati Binti Zulkifli ("Izzati"), who was an employee of the 1st Plaintiff. It is pleaded that sometime in June 2012, Izzati confessed to the Plaintiffs' directors that she had falsified the Plaintiffs' cheques drawn against the Defendants and, somehow, presumably, she managed to secure payment to herself. Subsequently, the Defendant banks were informed by letters dated 4th June 2012 that Izzati's employment had been terminated and that she no longer represented the Plaintiffs. Meanwhile Izzati, was alleged to have been tried, convicted and sentenced to jail for her offences against the Plaintiffs. The Plaintiffs claimed that their joint losses from the falsified cheques amounted to a total sum of RM1,827,952.54.

[3] Against the Defendants, the Plaintiffs assert that they had no mandate to honour the cheques forged by Izzati, that the forged cheques were void and that the Defendants had been negligent in honouring the forged cheques. The particulars of negligence delivered against the four Defendants were as follows:

- “ 24. Plaintiff-plaintif turut menegas bahawa Defendan-Defendan Pertama, Kedua, Ketiga dan Keempat tidak mempunyai kuasa atau ~~mandate~~ mandat samaada secara khusus atau tersirat daripada Plaintiff-Plaintif untuk bertindak membuat apa-apa pembayaran diatas cek-cek yang telah dipalsukan tandatangan penandatangan-penandatangan Plaintiff-Plaintif.
25. Dengan menunaikan cek-cek yang dipalsukan oleh Izzati tersebut, dan mengeluarkan dana Plaintiff-Plaintif daripada akaun Plaintiff-Plaintif, Defendan-Defendan Pertama, Kedua, Ketiga dan Keempat telah bertindak secara cuai dan mengakibatkan kehilangan serta kerugian kepada Plaintiff-Plaintif. Butir-butir kecuai Defendan-Defendan Pertama, Kedua, Ketiga dan Keempat adalah seperti berikut:-

Butir-Butir Kecuaian Defendan-Defendan Pertama, Kedua, Ketiga dan Keempat

- 25.1 Gagal untuk meneliti jika ada, tandatangan-tandatangan penandatangan-penandatangan yang dikuatkuasakan untuk menandatangani cek-cek yang dipalsukan oleh Izzati yang tersebut.
- 25.2 Gagal untuk mengambil apa-apa langkah untuk membandingkan tandatangan-tandatangan diatas cek-cek yang dipalsukan dengan specimen tandatangan-tandatangan yang telah diberikan oleh Plaintiff-Plaintif sebagai contoh tandatangan penandatangan-penandatangan yang telah diberi kuasa untuk menandatangani cek-cek Plaintiff-Plaintif.
- 25.3 Gagal untuk mengambil apa-apa langkah menghubungi mana-mana penandatangan dan/atau pengarah dan/atau ~~principal~~ Prinsipal Plaintiff-Plaintif untuk mengesahkan niat Plaintiff-Plaintif melakukan pembayaran diatas cek-cek yang dipalsukan tersebut dan/atau;
- 25.4 Gagal untuk mengambil apa-apa langkah menghubungi mana-mana penandatangan dan/atau pengarah dan/atau ~~principal~~ Prinsipal Plaintiff-Plaintif untuk mendapatkan kepastian bahawa penandatangan yang sah dan diberi kuasa oleh Plaintiff-Plaintif telah sesungguhnya

menandatangani cek-cek yang tersebut bilamana terdapatnya perbezaan yang ketara di antara tandatangan yang dipalsukan dengan specimen tandatangan penandatangan-penandatangan Plaintiff-Plaintif.”

[4] In the Amended Statement of Claim, the Plaintiffs then set out the particulars of the cheques alleged to have been negligently honoured by the Defendant banks. In relation to the 4th Defendant, the cheques claimed to be wrongly honoured were those issued in respect of the 2nd Plaintiff’s account with the 4th Defendant and the particulars pleaded were as follows:

“Akaun Bank Plaintiff Kedua bernombor 1404-0000-524-108 dengan CIMB Islamic Bank Berhad

A. CEK-CEK YANG MEMPUYAI BUTIR-BUTIR PEMBAYARAN

No.	No. Cek dan tarikh	Penerima Cek	Nama Bank Pembayar dan/atau Nombor Akaun	Jumlah (RM)
1.	000104 (01.05.10)	Izzati	MBB - 162106332087	8,000.00
2.	000157 (18.05.10)	HAQ & Associates	CIMB - 12360000181109	15,500.00
3.	000272 (07.03.11)	SCB – Credit Card Centre	SCB – 5404-7810-0159- 8974	1,980.00
4.	000393 (01.08.11)	Maybankard Centre	Maybankard Centre 5421-2400-3671- 6001	3,005.00
5.	00397 (01.08.11)	SCB – Credit Card Centre	SCB – 5404-7810-0159- 8974	3,400.00

6.	000398 (01.08.11)	Maybankard Centre	Maybankard Centre 5421-2400-3671- 6001	2,800.00
7.	000400 (11.08.11)	Izzati	MBB - 162106332087	6,296.00
8.	000427 (13.08.11)	Chang Huey Kim	RHB – 11435200093654 No. H/P:016- 6722367	5,400.00
9.	000422 (19.08.11)	Izzati	MBB - 162106332087	4,946.00
10.	000428 (10.09.11)	Izzati	MBB - 162106332087	4,000.00
11.	000429 (10.09.11)	Maybankard Centre	Maybankard Centre 5421-2400-3671- 6001	3,500.00
12.	000512 (01.11.11)	Jetshen ID Sdn Bhd	HLB - 05100304436	1,342.00
13.	000663 (16.05.12)	Maybankard Centre	Maybankard Centre 5421-2400-3671- 6001	1,500.00
14.	000657 (27.05.12)	Izzati	MBB - 162106332087	6,000.20
15.	000013 (03.09.09)	Izzati	MBB - 162106332087	10,000.00
16.	000038 (31.07.09)	Maybankard Centre	Maybankard Centre 5421-2400-3671- 6001	5,000.00
17.	000075 (11.12.09)	Maybankard Centre	Maybankard Centre 5421-2400-3671- 6001	5,000.00
18.	000089 25.01.10	Izzati	MBB – 162106332087	10,000.00
19.	000095 (08.02.10)	SCB – Credit Card Centre	SCB – 5404-7810-0151- 3023	5,000.00

20.	000176 (07.06.10)	Maybank Berhad	MBB - 789821107013	11,984.75
21.	000451 (26.09.11)	SCB- Credit Card Centre	SCB- 5404-7810-0159-8974	3,400.00
22.	000571 (10.01.12)	Maybankard Centre	Maybankard Centre 5421-2400-3671-6001	5,559.76
23.	000011 (01.09.09)	Izzati	MBB - 162106332087	1,910.10
24.	000012 (01.09.09)	Izzati	MBB - 162106332087	1,750.00
25.	000024 (30.06.09)	Izzati	MBB - 162106332087	1,952.00
26.	000271 (02.02.11)	SCB – Credit Card Centre	SCB – 5404-7810-0159-8974	1,980.00
27.	000551 (18.01.12)	Izzati	SCB - 873194980446	2,500.00
28.	000552 (18.01.12)	SCB – Credit Card Centre	SCB – 5404-7810-0159-8974	1,270.00
29	000553 (13.01.12)	Izzati	SCB - 873194980446	1,870.00
			JUMLAH	136,845.81 ”

The 4th Defendant's Application

[5] The 4th Defendant's application under Enclosure 17 was premised simply upon the contention that the 2nd Plaintiff's claim in respect of 27 of the 29 cheques honoured by the 4th Defendant, was time barred. These 27 cheques are those whose particulars were pleaded by the Plaintiffs in the table above under numbers 1 to 12 and 15 to 29. Based on the

pleaded particulars, these 27 cheques were all dated before the 15th of February 2012. In its Defence, the 4th Defendant pleaded and, thus invoked, the defence of limitation afforded pursuant to section 6 of the Limitation Act 1953.

[6] In support of its application in Enclosure 17, the 4th Defendant filed an affidavit affirmed by one Zahara Binti Fadzil on 26th July 2018 (Enclosure 18), who is a Branch Manager of the Defendant. In paragraph 8 of this affidavit it was specifically stated that the 27 cheques in question were all honoured and paid out by the 4th Defendant between 23rd July 2009 and 15th February 2012. Evidence in support of this statement was provided in Exhibit “CIMB-4” to this affidavit. Exhibit “CIMB-4” consisted of copies of the 27 cheques in question and statements indicating the dates they were honoured by the 4th Defendant as the payee bank.

[7] In the Plaintiffs’ affidavit in reply affirmed by one David Teh Teik Lim @ Tai Wai on 13th August 2018 (Enclosure 23), the aforesaid evidence in paragraph 8 of the 4th Defendant’s affidavit (Enclosure 18) was not denied. It is trite that since the assertion in paragraph 8 of the 4th Defendant’s affidavit (Enclosure 18) was not denied, it must be deemed admitted (See *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 at p 385; *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; and *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332 and *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533 FC). Instead, the Plaintiffs merely insisted that the forged cheques, thus the fraud, were only realized or discovered on or around 24th May 2012.

The competing contentions

[8] The 4th Defendant's contention was plainly that since the 27 cheques had been honoured more than 6 years before the issue of the Writ in this action, the claim against the 4th Defendant was time barred by reason of the provisions in section 6(1) of the Limitation Act 1953. For completeness the relevant provisions of section 6 are set out below:

"Limitation of actions of contract and tort and certain other actions

6. (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say—

- (a) actions founded on a contract or on tort;
- (b) actions to enforce a recognisance;
- (c) actions to enforce an award;
- (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture."

[9] The 4th Defendant further contended that the limitation period for a claim in the tort of negligence, and I would add for want of mandate in contract, is 6 years from when the cause of action accrued. In this case, in respect of the claim in negligence, the 2nd Plaintiff's loss or damage arose at the time monies were paid out of its account with the 4th Defendant when the 27 allegedly fraudulently drawn cheques were honoured and paid by the 4th Defendant. As was stated by the Court of Appeal in *Ambank (M) Bhd v Abdul Aziz Bin Hassan & Ors* [2010] 3 MLJ 784, "[34] It is trite law that a cause of action founded in tort accrues when the appellant suffers

damage (Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid).” As for the alleged breach of mandate, that would also have occurred at the same time when the cheques were honoured by the 4th Defendant. In relation to the 27 cheques, payments were made by the 4th Defendant between 23rd July 2009 and 15th February 2012 and therefore the causes of action in tort and contract would have arisen more than 6 years before the issue of the Writ in this action, which was on 16th May 2018.

[10] The Plaintiffs however, contended that time should run from when the fraud was discovered. This was said to be sometime around the 24th of May 2012. Since the Writ was issued on 16th May 2012, it was argued that this action was thus filed within the limitation period. In support of this contention, the Plaintiffs relied on the authority of the decision in *Malayan Testing Laboratory Sdn Bhd v Standard Chartered Bank Malaysia Bhd* [2010] 9 CLJ 309, citing from paragraph 103 of the report of the judgment wherein it is stated:

“[103] The court finds that limitation does not apply by virtue of s. 6 of the said Act as the cause of action only accrued on 27 January 1998 when PW1 first found out about the misappropriation of MTL's funds. Prior to this date he had no inkling of what was going on.”

[11] In this action however, there was no allegation of fraud against the 4th Defendant and thus section 29 of the Limitation Act 1953 would not apply (see *Jaafar bin Mohd Khalid v Hong Leong Bank Bhd* [2013] 5 MLJ 800). Section 29 of the Limitation Act 1953 provides as follows:

“Postponement of limitation period in case of fraud or mistake

29. Where, in the case of any action for which a period of limitation is prescribed by this Act, either–

- (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it :

Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which–

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- (ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

The fraud, as pleaded, was that by an ex-employee of the Plaintiffs. In any event, in learned counsel for the Plaintiffs’ submissions, it was stated that section 29 of the Limitation Act 1953 does not apply. In addition, section 29 was not pleaded by the Plaintiffs. In *Ambank (M) Bhd v Abdul Aziz Bin Hassan & Ors* [2010] 3 MLJ 784, the Court of Appeal held that the only provision in the Limitation Act 1953 that allows for a postponement of the limitation period on grounds that the plaintiff was unaware that a cause of

action had arisen is in section 29 and, if it is to be relied upon, section 29 must be expressly pleaded. The following was stated by the Court of Appeal at p 791 in paragraph 16 of the report:

“[16] We have read s 29 of the Limitation Act 1953 and we say that this is the only provision which allows a plaintiff to postpone the limitation period on the grounds that the facts are not known to the plaintiff. We say that the limitation period may be postponed [sic] only if the cause of action is based on fraud of the defendant or is concealed by the defendant or is an action for relief from consequences of a mistake. We categorically say that s 29 of the Limitation Act 1953 is not applicable to the appellant for the simple reason that this issue was never pleaded nor raised. The parties must be bound by their pleadings (*Koh Siak Poo v Sayang Plantation Bhd* [2002] 1 MLJ 65, *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; *Lever Brothers, Limited, and others v Bell and another* [1931] 1 KB 557; *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615; *S Manickam & Ors v Ismail bin Mohamad & Ors* [1997] 2 MLJ 90; *Narayanan v Kannamah* [1993] 3 MLJ 730; *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 (FC); *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416; *Wisma Punca Emas Sdn Bhd v Dr Donal R O’Holohan* [1987] 1 MLJ 393; *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302; *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633; *Rosita bte Baharom (an infant) v Sabedin bin Salleh* [1993] 1 MLJ 393; *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 (FC); *Morello Sdn Bhd v Jacques (International) Sdn Bhd* [1995] 1 MLJ 577 (FC); and *Lim Tiong Huai v Wang Swee Teck (trading as Wang Plumbing & Electric Co)* [2004] 1 MLJ 638). Pleadings operate to define and delimit with clarity and precision the real matters in controversy between the parties so that their respective cases can be prepared with ease and the court too can expeditiously adjudicate them. No litigant should be taken by surprise or be led astray due to faulty pleading.”

(Emphasis added)

Conclusion

[12] No exception to section 6 of the Limitation Act 1953 was pointed to or pleaded by the Plaintiffs. In fact, nothing was offered as to why the limitation period under the Limitation Act 1953 should be postponed from the time the Plaintiffs' cause of action arose to a subsequent date when the Plaintiffs' ex-employee's fraud was discovered.

[13] Having regard to the decision of the Court of Appeal in *Ambank (M) Bhd v Abdul Aziz Bin Hassan & Ors* [2010] 3 MLJ 784, I am of the view that the cause of action in this case arose more than 6 years before the issue of the Writ and was not postponed to the later date when the alleged fraud was discovered. As was held by the Federal Court in *Haji Hussin bin Hj Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and Connected Cases* [1983] 2 MLJ 227 at p 231:

“We need not go further than to refer to the judgment of this Court in *Tio Chee Hing & Ors v Government of Sabah* [1981] 1 MLJ 207 where this court referred to the Court of Appeal decision in *Riches v Director of Public Prosecutions* [1973] 2 All ER 935 939 which decided that where it is clear that the defendant was going to rely on the statute of limitations and there was nothing before the court to suggest that the plaintiffs could escape from it, the claim would be struck out.”

In this case, as stated, the defence of limitation was invoked and pleaded by the 4th Defendant in its defence.

[14] The striking out of a claim is drastic and is not done by our Courts, save in plain and obvious cases (See *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (FC) and *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1 (FC)). In this action, based on the Plaintiffs' pleaded case and, even assuming what has been pleaded is proven, it is plain and obvious that the claim against the 4th Defendant is not sustainable by reason of the provisions in section 6 of the Limitation Act 1953.

[15] For the reasons given above, the 4th Defendant's application in Enclosure 17 was allowed with costs of RM5,000.00 to the 4th Defendant subject to payment of the allocatur fee of 4% of the costs awarded.

Dated this 28th Day of September 2018

-sgd-

(DARRYL GOON SIEW CHYE)

Judicial Commissioner

High Court of Malaya

Kuala Lumpur

(Civil NCvC 2)

CASES CITED

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281

Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332

Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533 FC

Ambank (M) Bhd v Abdul Aziz Bin Hassan & Ors [2010] 3 MLJ 784

Malayan Testing Laboratory Sdn Bhd v Standard Chartered Bank Malaysia Bhd [2010] 9 CLJ 309

Jaafar bin Mohd Khalid v Hong Leong Bank Bhd [2013] 5 MLJ 800

Haji Hussin bin Hj Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and Connected Cases [1983] 2 MLJ 227

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (FC); [1993] 4 CLJ 7

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1 (FC)

Chong Chit Heng v RHB Investment Bank Berhad [2014] 1LNS 308

Hup Soon Properties Sdn Bhd v Jegathesan Karupiah & Ors [2012] MLJU 1527

Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd [1996] 1 CLJ 257; [1996] 1 MLJ 309

LEGISLATION AND LEGAL TEXT CITED

S.6, S. 29 of the Limitation Act 1953 ("LA1953")

O.18 r.19 of the Rules of Court 2012

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